SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 68

SAM L. McDONALD AND ANDREW BYRD, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, CHAIRMAN, MARIE H. SUTHERS, COMMISSIONER, AND FRANCIS P. CANARY, COMMISSIONER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF APPELLEES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1372.

SAM L. McDONALD AND ANDREW BYRD, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,
Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, CHAIRMAN, MARIE H. SUTHERS, COMMISSIONER, AND FRANCIS P. CANARY, COMMISSIONER,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF APPELLEES.

QUESTION PRESENTED.

Does the failure of the absentee voting provisions of the Illinois statute to authorize the issuance of absentee ballots to unconvicted inmates of a penal institution incarcerated due to unavailability of bail or financial inability to post bond pending trial while extending such a privilege to individuals unable to personally attend the polls for reasons of absence from the county, physical incapacity for medical reasons, or observance of a religious holiday render those statutes unconstitutional as denying the appellants the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Constitution of the United States of America?

ARGUMENT.

I.

APPELLANTS ARE NOT IN SUBSTANTIALLY SIMILAR CIRCUMSTANCES AS MEMBERS OF THE CLASSES TO WHOM THE PRIVILEGE OF VOTING BY ABSENTEE BALLOT HAS BEEN EXTENDED.

The precise question involved in this appeal does not appear to have been presented to this Court before. Previous cases involving the franchise have involved questions of apportionment or the qualifications of voters. No such issues are involved in this appeal. The question here involved is the extension of the privilege of absentee voting to classes of individuals unable to personally attend the polls. Absentee voting statutes have been consistently construed by the state Courts as a privilege extended electors and not an absolute right. *Frink* v. *State,* 160 Fla. 394, 35 So. 2d 10 (1948); *Crowe* v. *Emmert,* 305 S. W. 2d 272 (Kentucky 1957); *Ragan* v. *Burnett,* 305 S. W. 2d 759 (Kentucky 1957); *Ragan* v. *Burnett,* 306 S. W. 2d 281 (Kentucky 1957); *Hallahan* v. *Mittlebeeler,* 373 S. W. 2d 726 (Kentucky 1963); *Wichelmann* v. *Glencoe,* 200 Minn. 62, 273 N. W. 638 (1937); *Wheelock* v. *Haney,* 138 Neb. 547, 293 N. W. 418 (1940); *McMaster* v. *Wilkinson,* 145 Neb. 39, 15 N. W. 2d 348 (1944); *Miller* v. *Mersch,* 152 Neb. 746, 42 N. W. 2d 652 (1950); *De Flesco* v. *Mercer County Board of Elections,* 43 N. J. Super. 492, 129 A. 2d 38 (1957); *Portmann* v. *Board of Elections,* 60 Ohio App. 54, 19 N. E. 2d 531 (1938); *Brown* v. *Dakota Public Service Company,* 68 S. D. 169, 299 N. W. 569 (1941); *Fugate* v. *Buffalo,* 348 P. 2d 76 (Wyoming 1959).

Essentially the equal protection guarantee requires that

all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. *Hartford Steam Boiler Inspection and Insurance Company* v. *Harrison,* 301 U. S. 459, 81 L. Ed. 1223, 57 S. Ct. 838. Every qualified voter unable to cast his ballot in person need not be furnished an absentee ballot. Mere classification does not of itself deprive a group of equal protection. *Williamson* v. *Lee Optical Company,* 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563; *Carrington* v. *Rash,* 380 U. S. 89, S. Ct. 775. All legislation involves some classification; discrimination, not differentiation is prohibited. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin* v. *State of Florida,* 379 U. S. 184, 191; 85 S. Ct. 283, 288. "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . .", *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50; 79 S. Ct. 985, 989 (1959). Only "invidious discrimination" is forbidden. *Reynolds* v. *Sims,* 377 U. S. 533, 94 S. Ct. 1362; *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663, 86 S. Ct. 1079. "Minors, felons and other classes may be excluded." *Gray* v. *Sanders,* 372 U. S. 368, 380, 83 S. Ct. 801, 809.

Classification is not susceptible to an exact exclusion or inclusion of persons. It is almost impossible in many situations to forsee and provide for every imaginable and exceptional case and a legislature ought not be required to do so at the risk of having its legislation declared void. *Ozan Lumber Company* v. *Union County National Bank,* 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89. A classification does not offend the Equal Protection Guarantee merely because it is not made with mathematical nicety or because in practice it results in some inequality. *Morey* v. *Doud,* 354 U. S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344. Accidental

inequality is one thing; intentional and systematic discrimination is another. *First National Bank* v. *Albright*, 208 U. S. 548, 52 L. Ed. 614, 28 S. Ct. 349.

Several state courts have had an opportunity to consider the question of the constitutionality of absentee voter statutes in the light of equal protection objections, and have consistently rejected those objections. *Straughan* v. *Meyers*, 187 S. W. 2d 1159 (Missouri 1916); *Lemons* v. *Noller*, 63 P. 2d 177 (Kansas 1936). In *Hallahan* v. *Mittlebeeler*, 373 S. W. 2d 726 (Kentucky Court of Appeals 1963) the Court rejected similar objections. The Kentucky statute in question established two general classes of voters eligible to vote by absentee ballot consisting of persons serving the federal government and their spouses and dependents and full time students absent from the county of their residence on the day of election. The statute was challenged as failing to provide absentee ballots to others who were qualified voters and similarly absent from the county on the date of the election. The Court stated:

> "Admittedly they do not include many otherwise qualified voters who might normally be absent from the county of their residence on the day of an election. However, we perceive that the Legislature extended the privilege of absentee voting to persons living away from their county of legal residence who may be expected to retain their voting residence in Kentucky and who cannot conveniently and economically return to their home county on election day. The two classes selected by the Legislature appear to be the only large identifiable classes that accomplish the object of this legislation even though they do not do so with mathematical accuracy. That there will be exceptional circumstances in individual cases does not, of course affect the validity of the basic classifications . . . . Classification must have relation to the purpose of the Legislature: But logical appropriateness of the inclusion or exclusion of objects or persons is not required

> . . . At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment."

The Illinois legislature has extended the privilege of voting by absentee ballot to three categories of persons:

1. Absence from the county.
2. Physical incapacity for medical reasons.
3. Observance of religious holiday.

(Section 19-1, 19-2 and 19-3, Chapter 46, Illinois Revised Statutes (1967). Full text in appendix to Appellants' Brief pages 15-24). The plaintiffs clearly do not fall within any of these classes. Other possibly meritorious classes of persons are not provided for—cloistered nuns, mothers of small children unable to afford or procure someone to watch their children on Election Day, breadwinners unable to afford to take time off from their employment without pay. The crucial question would appear to be whether the plaintiffs are in substantially similar circumstances as members of the classes to whom the privilege of voting by absentee ballot has been extended.

The plaintiffs are not similarly situated and that the failure of the Legislature to provide them with absentee ballots does not deny them equal protection of the laws. The plaintiffs do not complain and indeed constitutionally cannot complain of substantially different treatment from that afforded persons who are not under restraint. One of the named plaintiffs is not entitled to bail because of the nature of the offense with which he is charged, and he does not complain of the unavailability of bail. The other named plaintiff alleges that he is financially unable to post the bail fixed but he does not contend that the amount set is unreasonable.

A prisoner is a person who is deprived of his liberty by virtue of judicial or other lawful process. Prisoners are

not able to move about as they please. They cannot attend the church of their choice, nor are religious services of all denominations available to them. They are permitted visitors only at certain times and places and then only under watchful eyes. They are not permitted to select their own menus even if able to afford to purchase whatever they choose. They may be required to wear uniform clothing. They are permitted to eat, sleep and exercise only at specified times. Entertainment is limited. For violation of disciplinary rules they may be placed in solitary confinement or their rations may be limited. None of these deprivations have been successfully challenged as violating the equal protection of the laws.

Prisoners awaiting trial are not in substantially similar circumstances as members of the classes to whom the privilege of voting by absentee ballot has been extended by the Legislature. No invidious discrimination is present.

II.

APPELLANTS ARE NOT DEPRIVED OF THE RIGHT TO VOTE BY REASON OF POVERTY.

Appellants attempt to persuade the Court that the cart is pulling the horse. No complaint is made that they are unlawfully restrained or that the unavailability of bail or their inability to post reasonable bail deprives them of any rights guaranteed them by the Constitution of the United States. Instead they complain of one of the many consequences of lawful restraint—their inability to be physically present at the polls on election day. They attempt to come within the purview of *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079. Appellants confuse cause with effect. If they do not complain about the lawfulness of their restraint, how can they complain about one of the incidents of lawful restraint, their inability to come

and go as they please? Need prisoners be afforded privileges when they can be denied liberty?

Appellants cite with favor two decisions of the United States District Court for the Northern District of Illinois. *Norman Bonds* v. *Board of Election Commissioners* (Unreported—66C2012 D. C. N. D. Ill. November 4, 1966); *McDonald* v. *Board of Election Commissioners,* 265 F. Supp. 816 (D. C. N. D. Ill. 1967). A demand for an absentee ballot in each of these cases was presented to the election authorities on the last day permitted for application for absentee ballots. The demands were refused. Lawsuits were immediately instituted. The defendants were permitted the luxury of a single night to prepare responsive pleadings. Hearings were hastily conducted the next day. In each instance a decision was rendered hours thereafter. Effective judicial review was precluded. In *McDonald I* an application for stay of enforcement of judgment was denied by the trial court, subsequently denied by the United States Court of Appeals for the Seventh Circuit after a weekend had elapsed and defendants' appeal was shortly thereafter dismissed as moot. The instant case was decided after extensive briefs were submitted and lengthy arguments were conducted. Is haste to be preferred to due deliberation? The gist of the District Court decisions referred to above is that there was no intention on the part of the Illinois Legislature to disenfranchise prisoners awaiting trial. It is equally clear that the Illinois Legislature did not intend to extend the privilege of absentee voting to prisoners awaiting trial. No intentional discrimination is present. The legislature extended the privilege of absentee voting to the largest ascertainable classes of individuals unable to be personally present at the polls.

III.

THE RELIEF REQUESTED BY THE APPELLANTS IS BEYOND THE POWER OF A COURT TO GRANT.

The privilege of voting by absentee ballot can be extended to new classes of individuals only by a legislature and not by a court. The privilege of voting by absentee ballot is strictly regulated by statute and violations of these regulations are punishable by severe criminal penalties (Article 29A, Sec. 1, 3 and 5; Chapter 46, Illinois Revised Statutes, Appendix Page 9). These penalties attach only to applications accompanied by affidavits prescribed by the statute and not to some substitute which might be tolerated. The criminal sanctions were intended to insure that an individual voting by absentee ballot cast his ballot independently and in secret. To permit absentee balloting without these safeguards would permit fraudulent voting at political headquarters without any criminal sanctions attaching.

In the event that the statutes involved were declared unconstitutional, the appellants would not be entitled to relief. The result of a decision declaring the statutes unconstitutional would be to deny to all qualified voters the privilege of voting by absentee ballot. The effect of such a decision would be analogous to throwing the baby out with the bath water or to alleviating the inequities created by poverty by reducing everyone to the status of a beggar.

CONCLUSION.

For the reasons above stated, the decision below ought to be affirmed.

Respectfully submitted,

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